No. 84-778

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

BAXTER MACON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the arrest of Respondent was unconstitutional, where an undercover police officer who purchased two magazines from Respondent at an adult bookstore, arrested Respondent without a warrant and without submitting the magazines to a judicial officer?

2. Even assuming Respondent's warrantless arrest was illegal, whether the proper remedy was to exclude from evidence the magazines, which had been purchased by the undercover police officer prior to the warrantless arrest?

3. Even assuming that the magazines should have been suppressed, whether the proper remedy was to reverse Respondent's conviction and dismiss the charging document?

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

No.

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OPINION OF THE COURT BELOW

The opinion of the Court of Special Appeals is reproduced in the Appendix.

STATEMENT OF JURISDICTION

The opinion of the Court of Special Appeals of Maryland was filed March 2, 1984. The State of Maryland's Petition for Writ of Certiorari was denied by the Court of Appeals of Maryland on September 14, 1984. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1257(3) and Rules of the Supreme Court of the United States, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTES

Annotated Code of Maryland 1982 Repl. Vol.,

Article 27:

§594B. **Arrest by a police officer without warrant:**

> "(a) A police officer may arrest without a warrant any person who commits, or attempts to commit, any felony or misdemeanor in the presence of, or within the view of, such officer.
>
> (b) A police officer may, when he has probable cause to believe that a felony or misdemeanor is being committed in his presence or within his view, arrest without a warrant any person whom he may reasonably believe to have committed such offense."

§417 - Definitions:

As used in this subtitle,

> "(1) **"Matter"** means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.
>
> (2) **"Person"** means any individual, partnership, firm, association, corporation, or other legal entity.

(3) **"Distribute"** means to transfer possession of, whether with or without consideration.

(4) **"Knowingly"** means having knowledge of the character and content of the subject matter.

§418 - Sending or bringing into State for sale or distribution; publishing, etc., within State:

"Any person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

STATEMENT OF THE CASE

On May 6, 1981, Detectives Ray Evans and Roland B. Sweitzer, assigned to the Vice-Criminal and Narcotics Section of the Prince George's County Police Department, pursuant to an ongoing investigation of adult book stores in Prince George's County, went to Silver News, Inc., an adult book store located at 2488 Chillum Road, Hyattsville, Maryland. The investigation had been instigated following a series of complaints by citizens who were concerned that these stores were selling obscene materials to juveniles. Detective Sweitzer instructed Detective Evans to enter the

book store and purchase material that "showed explicit sexual conduct". Detective Evans entered the store and browsed for fifteen to twenty minutes before he selected two magazines wrapped together in clear plastic. The windows of the store were covered with paper to a point above eye-level for a normal sized person so that most people could not see in the store. There were magazines on display on the walls almost from the ceiling to the floor. On the right side, empty packages of eight millimeter movies were displayed. In the back was a movie room where customers could view for a fee the movies which were offered for sale. There were depictions of sexual acts on the covers of the magazines, most of which were wrapped in plastic.

Detective Evans took the two magazines out of the wrapper which was unsealed and examined them from cover to cover. He then took the magazines to Respondent who was on a platform behind the cash register. Evans purchased the two magazines for twelve dollars and paid for them with a fifty dollar bill supplied by the Vice section. Detective Evans then took the magazines to Detectives Sweitzer and Fickinger who were waiting in a car in the parking lot. They

examined the two magazines and as a result of their observations, determined that the photographs met the criteria they had used in previous warrants and arrests. The three officers then went inside the Silver News and placed Respondent under arrest for distributing obscene materials in violation of Article 27, §418. The fifty dollar bill was removed from the store by the officers at that time.

Respondent filed pretrial motions to dismiss and to suppress because a neutral judicial officer did not view the magazines prior to Respondent's arrest. At the hearing conducted September 1, 2, 15 and 16, 1981, in the Circuit Court for Prince George's County, the Honorable Robert J. Woods presiding, Respondent was joined with twelve co-defendants who had also been arrested for selling similar materials from other book stores. Respondent argued that he was entitled to dismissal of the charging document because his warrantless arrest constituted an illegal prior restraint on his right to freedom of expression.

Respondent also argued that the magazines should be suppressed because a police officer was not an ordinary paying customer. He contended that when an undercover

officer goes into a book store such as the Silver News and looks around, it is a search. When the police officer came into possession of the magazines by misrepresenting an exchange of money for goods he committed theft by "false pretense" under Maryland Annotated Code, Article 27, §341. Further, Respondent argued that when the officers retrieved the purchase money as evidence this rendered the prior sale void and meant that the taking of the fifty dollar bill constituted an illegal taking of property without due process of law. Therefore, Respondent argued that the retention of the magazine by the police as a result of the sham sale constituted an illegal seizure without a warrant.

In denying both motions, Judge Woods rejected Respondent's argument, finding instead, as the State had argued, that the bargained for exchange of magazines for money was not a seizure and that no prior judicial determination of obscenity was needed for the arrest of Respondent without a warrant for distribution of obscene matter.

The magazines were admitted at Respondent's jury trial. The only objection to their admission was based on

Respondent's lack of opportunity to have a voir dire examination of Detective Evans on the chain of custody. The State did not introduce the fifty dollar bill. At the conclusion of this four day trial from September 16-21, 1981, in which he asserted an entrapment defense, Respondent was found guilty of distribution of obscene matter. After waiving his right to speedy sentencing on December 2, 1981, Respondent was sentenced on January 25, 1983 to pay a fine of $500.00 plus $75.00 in court costs.

Respondent filed a timely appeal in the Court of Special Appeals. On March 2, 1984, the Court of Special Appeals reversed Respondent's conviction in a reported opinion by Judge Bishop (opinion attached in Appendix), holding that the warrantless arrest of Respondent was illegal. The court held that there was insufficient probable cause to support the warrantless arrest since the police had not taken the magazines to a judicial officer for a determination of obscenity. Notwithstanding the fact that the police officer had purchased the magazines from Respondent prior to the arrest, the Court of Special Appeals condemned this voluntary exchange of goods for money as a

"constructive seizure", based on the improper subjective intent of the officers to retrieve the purchase money later, and ordered that the magazines should have been suppressed to punish such police misconduct. Not only was Respondent's conviction reversed, but the Court of Special Appeals ordered that the indictment be dismissed. [1] The State of Maryland's Motion for Reconsideration was denied. The State then filed a Petition for Writ of Certiorari in the Court of Appeals of Maryland which was denied on September 14, 1981.

ARGUMENT

I.

THERE WAS ADEQUATE PROBABLE CAUSE TO SUPPORT THE WARRANTLESS ARREST OF RESPONDENT FOR DISTRIBUTION OF OBSCENE MATTER.

There is no question that the sale of obscene matter is illegal in Maryland and that the State can properly punish violations of Maryland Annotated Code, Article 27, §418

1 Respondent was not charged by indictment. The charging document was a Statement of Charges filed in the District Court for Prince George's County, Maryland. The case was transferred to the Circuit Court pursuant to Respondent's prayer for a jury trial.

prohibiting the distribution of obscene matter. Respondent does not and has not contested the constitutionality of this statute or the authority of State law enforcement officials to enforce violations of §418.

Maryland Annotated Code, Article 27, §594B provides that police officers may arrest persons who commit misdemeanors in their presence or whom they have probable cause to believe have committed a misdemeanor in their presence. Nevertheless, the Court of Special Appeals has created, by judicial fiat, an exception to this statute that a police officer can never, as a matter of law, have probable cause to arrest a person for distribution of obscene matter. This result was based on prior decisions of this Court which held that a police officer does not possess the requisite knowledge and sensitivity to seize suspected obscene materials without a warrant. In Roaden v. Commonwealth of Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973) and Heller v. State of New York , 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), this Court held that a police seizure of alleged obscene materials can only be undertaken pursuant to a search warrant issued after an ex parte probable cause

determination by an independent judicial officer. Although obscenity is not protected expression per se under the First Amendment it is presumptively protected until such a determination has been made.

The rationale behind these requirements is clear. A confiscatory seizure by law enforcement authorities, upon their determination of obscenity, effectively removes the works seized from public distribution. This represents the essence of a prior restraint of expression which is directly prohibited by the First Amendment. In addition, this Court has emphasized in Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) and Zurcher v. Stanford Daily, 436 U.S. 547, 564-65, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) that the need to protect individual First Amendment rights from government suppression necessitates more stringent application of Fourth Amendment safeguards in obscenity cases than in other criminal cases.

However, there is no reason to extend the requirement of judicial scrutiny prior to seizure of alleged obscene materials to the arrest of persons who distribute the materials particularly where the mode of distribution is

voluntary sale to undercover police officers. The warrantless arrest of an individual cashier of an adult book store, without more, does not involve any prior restraint of presumptively protected materials under the First Amendment. Respondent was no more legally or physically restricted in his distribution of magazines than if the sales for which he has been charged were made to ordinary customers. Moreover, the mere fact that Respondent's arrest for distribution may inhibit him or others from selling the same or similar materials is not the kind of chilling effect which results in a prior restraint prohibited by the First Amendment. Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288, 297 (S.D.N.Y. 1969, affirmed, 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970).

In finding the arrest in the instant case illegal, the Court of Special Appeals held that a "necessary predicate" to seizure of the person, as well as the allegedly obscene matter he distributes, is a prior judicial determination that there is probable cause to believe the matter is obscene. In support of its holding, the court relied on three cases of dubious value.

Penthouse International Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) was a civil case where a number of publishers sought injunctive relief from a Georgia prosecutor who had embarked on a program of arresting everyone who distributed certain publications, highly publicizing their actions which caused retailers to withdraw those publications from their shelves. This resulted in economic loss even though they were not subject to criminal prosecution. The Fifth Circuit Court of Appeals found that this conduct amounted to an informal system of prior restraint by "constuctive seizure" and affirmed the granting of injunctive relief.

In Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662, 667 (E.D. La. 1969), a civil case involving mass seizures, the federal district court held that it could enjoin State criminal prosecution of book distributors, where no prior adversarial hearing had been held prior to the arrests and seizures of materials involved. Not only did this holding predate Heller v. New York, supra, where this Court heid that an adversary hearing was not required, but more importantly, the holding was reversed and remanded by this Court on

appeal in Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), because the federal court had acted beyond its jurisdiction in intervening to enjoin the enforcement of State criminal laws.

Another case that the Court of Special Appeals relied on, Hall v. State, 229 S.E.2d 12 (Ga. App. 1976), was distinguished in Wood v. State, 240 S.E.2d 743 (Ga. App. 1977), cert. denied, 439 U.S. 899, 99 S.Ct. 265, 58 L.Ed.2d 247 (1978), because Wood involved an Atlanta policeman who purchased two magazines from the defendant and then arrested him without a warrant. Where the defendant voluntarily locked the store before being taken to the police station, there was no illegal seizure as in Hall v. State and Roaden v. Kentucky, because "the officer had probable cause to arrest the defendant because of a violation of our obscenity statute committed in the officer's presence" and because there was "no prior restraint of the freedom of expression by any unlawful state-initiated or state-enforced restraint." Id. at 744. Several courts have reached the same result as in Wood. See Carlock v. State, 609 S.W.2d 787 (Tex. Crim. App. 1981); Price v. State, 579 S.W.2d 492 (Tex. Crim.

App. 1979). In United States v. Fragus, 428 F.2d 1211, 1212-1213 (5th Cir. 1970), a case from the same circuit as Penthouse v. McAuliffe, [2] it was held that the arrest of a panderer of obscenity may be effected under the normal criminal processes without a prior judicial determination of the obscenity of the material he peddles.

The issue of whether or not the purchase of an allegedly obscene magazine by an undercover police officer constitutes probable cause for the officer to arrest the seller for distribution of obscene matter without a warrant is a question which has not been decided by this Court. Lower court results, both civil and criminal, have been divided. The State of Maryland maintains that its statute, Article 27, §594B, which allows police officers to arrest persons when a misdemeanor has occurred in their presence or when they have probable cause to believe that a misdemeanor has occurred in their presence is proper, and is not limited to

2 Even in Penthouse v. McAuliffe, the court acknowledged that the facts in Wood were different than those in Hall because of the purchase prior to the arrest. 610 F.2d at 1361.

those cases involving fleeing robbers. The Court of Special Appeals' opinion holds that categorically, as a matter of law, a police officer can never have probable cause to arrest a person for the misdemeanor of distribution of obscene matter without a warrant. Most, if not all of the other states, have comparable statutes which permit warrantless arrests by police officers under similar circumstances. If an exception is going to be made in obscenity cases, such a crucial public policy determination must come from the highest court in the land. Traditionally, probable cause has been found to exist when the facts and circumstances within the knowledge of the arresting officer, or of which he had reasonably trustworthy information, are sufficient to warrant a reasonably cautious person into believing that an offense had been committed by the person arrested. Draper v. United States, 79 S.Ct. 329, 358 U.S. 307, 3 L.Ed.2d 327 (1959). Indeed, this Court emphasized in Draper that the proof sufficient to establish guilt is quite different from the proof needed to substantiate the existence of probable cause.

Given the fluid concept of probable cause, which is quite distinct from the standard of proof necessary for guilt,

it is wrong for courts to categorically state, in the absence of a statute otherwise, that police officers, even experienced vice squad officers, can never, as a matter of law, have probable cause to believe that a person is distributing obscene matter in violation of state law. Review is warranted to determine whether a police officer who purchases allegedly obscene magazines can "reasonably believe" that the offense of distribution of obscene matter has occurred in his presence. No other crime requires that a warrant always be obtained prior to arrest. Review is of special importance due to the split in authority, since mere arrest, without more, does not prohibit public access to the material and does not constitute a prior restraint of protected expression under the First Amendment.

II.

EVEN IF, ASSUMING ARGUENDO, RESPONDENT WAS ILLEGALLY ARRESTED, SUPPRESSION OF THE MAGAZINES IS NOT WARRANTED WHERE THEY WERE PURCHASED PRIOR TO THE ARREST.

In its opinion, the Court found that the arrest and detention of Respondent in the instant case operated as a prior restraint since the Silver News book store was closed

following Respondent's arrest at 7:20 p.m. [3] Petitioner maintains that the closing of the store at approximately 7:30 p.m. for the remainder of that day, while perhaps a temporary dimunition of the public's access to the store, did not operate as an illegal prior restraint. Presumably the store was closed to the public each night until the next morning. There was no evidence that the store remained open to the public twenty-four hours a day. There was no reason to believe that the store was not open for business the next day. There was no evidence that any magazines or other

3 Although Det. Evans did not testify at the suppression hearing. Det. Sweitzer testified that the officers arrested Respondent at 7:20 p.m., that Respondent was handcuffed, that the $50 bill was retrieved and that the $38 change from the purchase was not returned to Respondent. It was only at trial that Respondent's counsel elicited testimony from Det. Sweitzer that Respondent was the only employee at the store and that he had been allowed to secure the store by locking it up before being transported to the police station. However, trial testimony may not be considered on appeal on review of the motion to suppress. Dobson v. State, 24 Md. App. 644, 649, 335 A.2d 124 (1975).

items were no longer on display or available for sale to the public the next day. Contrast this with the situation in Penthouse v. McAuliffe, where the arrests forced many book sellers to voluntarily withdraw certain publications from their shelves. Compare State v. Huddleson, 412 A.2d 1148 (Del. Super. 1980) with Carlock v. State, supra, and Wood v. State, supra.

Even if, assuming arguendo, the warrantless arrest of Respondent was illegal in the instant case, the only remedy to which Respondent was entitled was suppression of any evidence obtained through exploitation of the illegal arrest. Here, the only evidence which should or could have been suppressed was the fifty dollar bill which the police retrieved from the cash register at the time of Respondent's arrest since Respondent did not make any statements and no other evidence was obtained by police as a fruit of his arrest.

Although the Court of Special Appeals acknowledged in its opinion that an illegal arrest does not bar prosecution under Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), in its attempt to punish the police misconduct, the court went backwards in time to the sale of the magazines,

which occurred before the arrest, and termed it a "constructive seizure" in order to justify suppression of the magazines and provide Respondent with a meaningful remedy. Petitioner is unaware of any prior holding of this Court which would support such mental gymnastics. Essentially, the Court of Special Appeals has created a "bad faith" prong to the exclusionary rule: even if the police legally obtain evidence by purchase in an investigation of a criminal offense, that evidence can and should be suppressed as a "constructive seizure" if the subjective intent of the police at the time of the purchase is "bad" because they intended to recover the purchase money as evidence.

The Court of Special Appeals found support for its "backward bootstrapping" in State v. Furuyama, 637 P.2d 1095 (Haw. 1981). However, other courts have refused to find that police purchase of obscene magazines prior to a warrantless arrest for the distribution of the magazines constituted an illegal seizure requiring suppression of the magazines. In State v. Flynn, 519 S.W.2d 10, 12 (Mo. 1975), the Missouri Supreme Court explained:

> "The police officer purchased and paid for the book and he took possession of it by reason of that purchase. He owned it at the time he placed Appellant under arrest. It was the officer's, not appellant's. There is an attempt by appellant to contend that under the circumstances of this case, before he could be arrested for the sale of an obscene publication, it was necessary that the officer take the book to a magistrate for a determination of obscenity. He relies on such cases as Roaden v. Commonwealth of Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), and Heller v. State of New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), to the effect that a seizure of alleged obscene material must be undertaken pursuant to a warrant issued after a probable cause determination by an independent magistrate. But, as previously pointed out in this case, there was no seizure. Appellant was placed under arrest for the commission of a misdemeanor in the presence of a police officer. We find no merit to Appellant's first point."

There is no seizure even when police officers have retrieved the purchase money after the arrest. State v. Perry, 567 S.W.2d 380 (Mo. App. 1978); State v. Cox, 619 S.W.2d 794 (Mo. App. 1981), cert. denied, 455 U.S. 976, 102 S.Ct. 1485, 71 L.Ed.2d 688 (1982).

In State v. Welke, 216 N.W.2d 641 (Minn. 1974), the Minnesota Supreme Court rejected the defendant's claim that his sale of three magazines to police officers was not a "bona fide" one because of the officers' subsequent warrantless seizure of other magazines after they arrested defendant without a warrant. The Minnesota Supreme Court explained:

> "Whatever the subjective intent of the two officers may have been, the transaction by which they obtained three magazines in exchange for money cannot be considered a search or seizure. Purchases by undercover agents from willing sellers, in places far more private than a book store, were held in Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), not to violate the Fourth Amendment. Id."

For other cases holding that police purchases of allegedly obscene materials does not constitute a search or seizure, see Johnson v. State, 351 So.2d 10 (Fla. 1977); State v. Barrett, 292 S.E.2d 590 (S.C. 1982), cert. denied, 103 S.Ct. 388; People v. Peters, 368 N.Y.S.2d 753 (N.Y. Co. Ct. 1975); Speight v. State, 251 S.E.2d 36 (Ga. App. 1978), cert. denied, 444 U.S. 886; Cherokee News and Arcade, Inc. v. State, 533 P.2d 624, 626 (Okl. Crim. App. 1974); People v. Ridens, 282 N.E.2d 691 (Ill. 1972), vacated on other ground, 413, U.S. 912, appeal

after remand, 321 N.E.2d 264; State v. Dornblaser, 267 N.E.2d 434 (Ohio Com. Pleas 1971); and Goodwin v. State, 514 S.W.2d 942, (Tex. Crim. App. 1974)

Indeed, the purchase of suspected obscene materials has long been condoned in federal courts as a proper and effective investigative technique by law enforcement officials. In United States v. Gower, 316 F.Supp. 1390 (D.C. 1970), affirmed without opinion (D.C. Cir. 1971), vacated, 413 U.S. 914, vacated on other grounds, 413 U.S. 914, 93 S.Ct. 3067, 37 L.Ed.2d 1029 (1973), affirmed, 503 F.2d 189 (1974), an undercover police officer purchased several photographs, and later, a reel of film from the defendant. The court noted that ". . . the materials which are the subject of the charge were purchased by an undercover policeman, and not seized." Id. at 1393 (Emphasis in original). See Engstrom v. Robinson, 317 F.Supp. 124, 125 (S.D. Ala. 1970) and Star-Satellite, Inc. v. Rosetti, 317 F.Supp. 1339, 1342 (S.D. Miss. 1970). See also, United States v. Fifty Magazines, 323 F. Supp. 395, 401 (D. R.I. 1971) noting the "purchase exception". In United States v. Lethe, 312 F.Supp. 421, 422 (Ed. Cal. 1970) it was stated:

> "However, where a defendant has voluntarily parted with literature or films, as in the instant case, he cannot complain of a suppression when he is later prosecuted. I conclude that no judicial determination is required prior to trial."

In Conlisk v. Weintraub, 345 F.Supp, 780, 788 (N.D. Ill. 1971) the district court held that no reason existed for a prior hearing to determine obscenity under Illinois obscenity statutes, since no prior restraint had been placed upon an individual who had been subject to one arrest for sale of one publication which was not offensive to rights secured by the First Amendment.

The decision of the Court of Special Appeals is a totally unwarranted extension of Fourth Amendment search and seizure law by indiscriminate application of the exclusionary rule in a case that has a First Amendment implication but no Fourth Amendment violation. There was no search or seizure in the Fourth Amendment sense when the defendant voluntarily delivered incriminating evidence to police. See State v. Minneker, 271 N.E.2d 821 (Ohio 1971). In Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed. 312 (1966), a defendant who had sold narcotics to an undercover police officer argued that the purchase

constituted an unreasonable search and seizure under the Fourth Amendment. This Court observed that Lewis had:

> " . . . invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics. Petitioner's only concern was whether the agent was a willing purchaser who could pay the agreed price.
>
> * * *
>
> Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional per se. Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest." 385 U.S. at 210, 87 S.Ct. at 427, 65 L.Ed.2d at 315-16.

Regardless of whether the Court of Special Appeals approved of the police tactics used in the instant case, the magazines could not be excluded as the "fruit of the poisonous tree". In United States v. Artieri, 491 F.2d 440 (2nd Cir. 1974), it was held that evidence lawfully seized incident to an arrest is not transmuted into an unlawful seizure by a subsequent unconstitutional seizure made in the same case. In Wong Sun v. United States, 371 U.S. 471, 83

S.Ct. 407, 9 L.Ed.2d 441 (1963), this Court made clear that only those items would be suppressed which had been obtained by police through exploitation of the illegality; evidence which was obtained by means sufficiently distinguishable to be purged of the primary taint was thus admissible. 371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 455. In United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980), this Court explained that in the "fruit of the poisonous tree" cases, the "challenged evidence was acquired after some initial Fourth Amendment violation". 445 at 471, 100 S.Ct. at 1249, 63 L.Ed.2d 545 (emphasis in original). An illegal arrest "cannot not deprive the Government of the opportunity to prove [a defendant's] guilt through the introduction of evidence which is wholly untainted by the police misconduct". 445 U.S. at 474, 100 S.Ct. at 1251, 63 L.Ed.2d at 548. In United States v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), rehearing denied, 448 U.S. 911, 101 S.Ct. 25, 65 L.Ed.2d 1172, on remand, 629 F.2d 1181, this Court emphasized that even if the police action was illegal and unconstitutional, it did not require application of the exclusionary rule unless there had been a violation of Fourth

Amendment rights. Moreover, this Court cautioned against the "considerable harm" that would flow from "the indiscriminate application" of the exclusionary rule. 447 U.S. at 734, 100 S.Ct. at 2445, 65 L.Ed.2d at 475.

Consequently, in the instant case, it is clear that the purchase of the magazines by police was not achieved by exploitation of the illegal arrest. The purchase preceded the illegal arrest and was sufficiently removed from the taint of the arrest to permit its admissibility. Punishing the government for questionable police conduct is an "inadequate reason" to apply the exclusionary rule. United States v. Feaster, 494 F.2d 871, 876 (5th Cir. 1974), cert. denied, 419 U.S. 1036, 95 S.Ct. 522, 42 L.Ed.2d 313 (1974).

Therefore, under the traditional criteria used by this Court and others, the purchase of the magazines by the undercover police officer in the instant case cannot be considered a search or seizure in the Fourth Amendment sense either literally or constructively. There was no forcible dispossession where Respondent, a cashier in an adult book store, sold the two magazines to Det. Evans. Respondent voluntarily delivered the magazines to the police officer in

exchange for money. As in Lewis, the seller sold the goods at his own peril. The fact that Respondent regrets having voluntarily delivered the magazines to a disguised police officer in exchange for money does not render the police officer's actions illegal.

Although the Court of Special Appeals was obviously bothered by the fact that the police officers retrieved not only the fifty dollar bill which had been used to purchase the magazines, but kept the change they had obtained in the transaction, Petitioner is unaware of any formal or informal demand by Respondent to retrieve the thirty-eight dollars in change. Even if, assuming arguendo, the retention of this money, which was not used as evidence in Respondent's trial, is wrong, or not to be condoned, it has no effect on the validity of the initial police purchase of the magazine. See United States v. Wild, 422 F.2d 34 (2nd Cir. 1969). It is doubtful, whether Respondent, who was a clerk in the bookstore, and who is no longer employed there, has requisite title to the currency, to be entitled to its return, or to complain about its retention. See Welke v. State, 216 N.W.2d 641 (Minn. 1974). Regardless, the important thing is, that as

much as the Court of Special Appeals may disapprove of such police tactics, they are not so reprehensible as to render an otherwise bona fide purchase into a 'constructive seizure' so that the court may give Respondent relief from criminal prosecution for actions which the court may not consider criminal or the proper target of law enforcement officials.

III.

EVEN IF RESPONDENT'S CONVICTION SHOULD HAVE BEEN REVERSED BECAUSE THE PURCHASE OF THE MAGAZINES WAS AN ILLEGAL "CONSTRUCTIVE SEIZURE", DISMISSAL OF THE CHARGING DOCUMENT WAS AN IMPROPER REMEDY.

The Court of Special Appeals was not content to merely suppress the evidence and reverse Respondent's conviction, upon finding that the magazines should have been suppressed as a result of the "constructive seizure", but it took the additional step of ordering that the charging document be dismissed under this Court's holding in Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). In Burks, this Court was presented with the question of whether a defendant may be tried a second time when a reviewing court has determined that in a prior trial the

evidence was insufficient to sustain the verdict of the jury. This Court carefully distinguished between reversal for trial error and reversal for evidentiary insufficiency. In holding that retrial to correct trial error is not constitutionally proscribed by the Double Jeopardy Clause this Court held:

> "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair re-adjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." 437 U.S. at 15, 98 S.Ct. at 2149, 57 L.Ed.2d at 12.

In Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), this Court held that the standard announced in Burks was applicable to State prosecutions since the "constitutional prohibition against double jeopardy is fully applicable to State criminal proceedings". 437 U.S. at 24, 98 S.Ct. 2154, 57 L.Ed.2d at 21. However, the reversal by the

Court of Special Appeals in the instant case was not predicated upon insufficiency of the evidence adduced at the trial, but upon the erroneous admission of illegally obtained evidence. Once that inadmissible evidence was discounted, there was insufficient evidence to permit the trier of fact to convict Respondent. Thus, the question is whether in such circumstances, the double jeopardy clause automatically prohibits a retrial. This Court recognized this question in Greene but left it open:

> "We express no opinion as to the double jeopardy implications of a retrial following such a holding [that once inadmissible evidence is discounted, there was sufficient evidence to permit the jury to convict]." Id., 437 U.S. at 26, n.9, 98 S.Ct. at 2155, 57 L.Ed. at 22.

The issue left unresolved in Burks and Greene has been decided by numerous State and federal courts and two divergent views have emerged. For decisions ordering an automatic acquittal in these circumstances see United States v. Santora, 600 F.2d 1317 (9th Cir. 1979); State v. Alexander, 281 N.W.2d 349 (Minn. 1979); State v. Bannister, 594 P.2d 133 (Ha. 1979); In Re M.L.H. 399 A.2d 556 (D.C. 1979); Sloan v.

State, 584 S.W.2d 461 (Tenn. Crim. App. 1979); State v. Abel, 600 P.2d 994 (Utah 1979).

For cases holding that retrial is not automatically barred in these circumstances, see United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S., 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980); United States v. Block, 590 F.2d 535, 543 (4th Cir. 1978); People v. Sisneros, 606 P.2d 1317, 1319 (Colo. App. 1980); Hall v. State, 259 S.E.2d 41 (Ga. 1979); Irons v. State, 397 N.E.2d 603, 605-06 (Ind. 1979); Phillips v. Commonwealth, 600 S.W.2d 485, 486-87 (Ky. App. 1980); State v. Wood, 596 S.W.2d 394, 397-99 (Mo. 1980); Ex Parte Duran, 581 S.W.2d 683, 684-86 (Tex. Crim. App. 1979); State v. Lamorie, 610 P.2d 342, 347 (Utah 1980); (compare with State v. Abel, above); State v. Van Isler, 283 S.E.2d 836, 839 (W.Va. 1981); Commonwealth v. Taylor, 418 N.E.2d 1226, 1233-34 (Mass. 1981); State v. Verdine, 624 P.2d 580, 584-585 (Or. 1981) and State v. Boone, 393 A.2d 1361, 1367-1370 (Md. 1978).

In the instant case, if the evidence was illegally seized, the proper remedy for Respondent was suppression of the evidence and reversal of his convictions. However, the

Court of Special Appeals erred in automatically barring the State from a retrial simply because evidence was erroneously admitted at the original trial. It should not be up to the reviewing court to decide whether or not the State can prove its case by other means upon retrial, however unlikely it might appear at that time to the appellate judges. Even in Furuyama, supra, the Hawaii Supreme Court recognized that dismissal of the indictment was not the proper sanction for the erroneous admission of evidence at trial which had been obtained by the police in violation of the Fourth Amendment. There, the Hawaii Supreme Court reversed the conviction and remanded the case to the lower court for further proceedings consistent with its opinion.

It may be in the instant case, that the State cannot prove the charges against Respondent at a new trial without the magazines. On the other hand, it may be possible for the State to do so. But that is a decision for the State's Attorney to make upon remand of the case to the Circuit Court for Prince George's County. Appellate courts should simply not be allowed to decide on the basis of the appellate record before them, which may not involve all of the evidence the

State has available to it, whether or not a case can be proved on retrial without the admission of illegally obtained evidence.

CONCLUSION

This Court must review the Court of Special Appeals opinion which holds contrary to all established American law, that a police officer can never, as a matter of law, ever have probable cause to arrest a person without a warrant for a certain crime - the distribution of obscene matter. This Court must decide whether an ex parte hearing to determine whether material is obscene is necessary prior to a seizure of the distributor as well as prior to seizure of the allegedly obscene materials. By condemning the police use of disguise, purchase of materials and retrieval of "buy money", the Court of Special Appeals has indiscriminately applied the exclusionary rule because of its First Amendment implications even where there is no Fourth Amendment violation, simply because it did not approve of the police tactics used. Although First Amendment protections are to be scrupulously honored, that does not require suppression of evidence which is obtained without violation of the Fourth

Amendment. There was no Fourth Amendment violation of Respondent's privacy where he voluntarily parted with the magazines for money regardless of the subjective intent of the buyer. This Court has never required suppression of validly obtained evidence simply because police have subsequently detained someone without adequate probable cause. Nor has it automatically barred retrial because evidence was erroneously admitted at trial. Review of this case is absolutely necessary in order to define the parameters when protections of the First Amendment intersect with those of the Fourth Amendment.

Respectfully submitted,

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APPENDIX

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 226

September Term, 1983

BAXTER MACON

v.

STATE OF MARYLAND

Bishop
Adkins
Morton, James C., Jr.
(Ret. Specially
Assigned),

JJ.

OPINION BY BISHOP, J.

Filed: March 2, 1984

On September 21, 1981, a Prince George's County jury convicted the appellant, Baxter Macon, of violating Article 27, section 418 of the Maryland Annotated Code, which prohibits knowing distribution of obscene material. Fined $500.00 plus $75.00 court costs, appellant asks:

I. Were law enforcement officers required to obtain a judicial determination that there was probable cause to believe the matter distributed by appellant was obscene before they could seize it and arrest him?

II. Did the State fail to prove that appellant distributed obscene matter knowingly?

III. Does the First Amendment protect distribution of material that has not yet been judicially declared obscene?

We reverse on the basis of the first issue, and therefore need not address the other two.

Facts

As part of an investigation of adult bookstores in Prince George's County, Detective Ray Evans entered the Silver News adult bookstore, browsed for about twenty minutes and then selected for purchase two magazines enclosed in a clear plastic wrapper. Detective Evans paid

appellant with a fifty dollar bill, from which was taken the $12.00 charge for the magazines. Appellant placed the magazines in a brown paper bag and returned them to Evans, who then left the store. Detectives Sweitzer and Fickinger, who had been waiting in a car parked on a nearby lot, viewed the magazines and decided that, in their opinion, the magazines were obscene matter. Without consulting a judicial officer, they then entered the bookstore with Evans and placed appellant under arrest. They allowed appellant to usher out patrons and close the store before taking him away in handcuffs. When they made the arrest, the officers retrieved the fifty dollar bill that had been used for the "purchase;" [1] they did not return the change.

Law

Because there was no prior judicial determination of obscenity, and therefore no warrant authorizing the officers to seize the alleged obscene matter or arrest its distributor, appellant argues that the trial court should have suppressed the magazines and dismissed the charges.

1. For reasons stated, infra, we hold that this "purchase" amounts to an unlawful seizure.

A.

The primary question presented for our consideration, then, is whether a judicial officer must decide that there is probable cause to believe that matter is obscene before the matter or its distributor may be seized. We conclude, based on the ensuing analysis, that a warrant is needed to provide a procedural safeguard for freedom of expression protected by the First Amendment. The Supreme Court had declared:

> "We held in Roth v. United States, 354 U.S. 476, 485, that 'obscenity is not within the area of constitutionally protected speech or press.' But in Roth itself we expressly recognized the complexity of the test of obscenity fashioned in that case, and the vital necessity in its application of safeguards to prevent denial of 'the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.' Id. p.488. We have since held that a State's power to suppress obscenity is limited by the constitutional protections for free expression.
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> * * *
>
> ". . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ." Speiser v. Randall, 357 U.S. 513, 525. It follows that, under the

> Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possibile consequences for constitutionally protected speech."

Marcus v. Search Warrant, 367 U.S. 717, 730, 731 (1961). Accord Bantam Books, Inc. v. Sullivan, 372 U.S. 58,65-66 (1963); A Quantity of Books v. Kansas, 378 U.S. 205, 212 (1964); Tyrone, Inc. v. Wilkerson, 410 F.2d 639, 641 (4th Cir. 1969); Europo Books v. Pomerleau, 41 Md. App. 114, 121 (1979).

The need to protect first amendment rights from government suppression necessitates more stringent application of fourth amendment safeguards in obscenity cases than in other criminal cases. Zurcher v. Stanford Daily, 436 U.S. 547, 564-65 (1978); W. LaFave, Search and Seizure, §6.7 (e) (1978); 50 Am.Jur.2d, Lewdness, Indecency and Obscenity, §12 (1970). Primary among these safeguards is the warrant requirement. The complexity of the test for obscenity, and the need to ensure that constitutionally protected speech is not discouraged, require that the probable cause determination of obscenity be entrusted not to the police officer, who may lack legal expertise or impartiality,

but to the judicial officer, whose knowledge of the law, coupled with his neutrality and detachment, qualify him to make such a decision. In Marcus v. Search Warrant, supra, the Supreme Court found that a search warrant authorizing police to seize "obscene . . . publications", with no definition of this term to circumscribe their discretion, lacked sufficient particularity:

> "It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." 367 U.S. at 732.

Accord Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). See also Lee Art Theatre v. Virginia, 392 U.S. 636 (1968) (warrant must be based on more than an officer's conclusory assertion of obscenity).

In Roaden v. Kentucky, 413 U.S. 496 (1973), a county sheriff viewed a sexually explicit film, then, acting without a warrant, arrested the theatre manager and seized one copy of

the film. The Supreme Court found that protection of first amendment freedoms could not be left to the whim of a law enforcement officer:

> "The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression.
>
> * * *
>
> The seizure proceeded solely on a police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity.' See Heller v. New York, ante, at 488-489; Marcus v. Search Warrant, 367 U.S. at 732. If, as Marcus and Lee Art Theatre, held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, a fortiori, the officer may not make such a seizure with no warrant at all. 'The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. . . . The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.' Marcus v. Search Warrant, supra, at 724, 729." Id. at 504, 506.

Thus, consideration of first amendment rights necessitates obtention of a judicial warrant as a precondition to seizure of allegedly obscene materials. [1] Zurcher v.

1. The Court established one exception to the warrant requirement, when police are faced with a "now or never" situation in which they must seize the allegedly obscene material or its distributor instantly or lose the opportunity. 413 U.S. at 505-06. We are not convinced that there were such exigent circumstances in this case. On the contrary, it appears that the Silver News book store was a continuing business that had been in operation at the same location for five to six years. There is nothing in the record to indicate that appellant or the magazines would not have been subject to seizure after the time required to have a neutral magistrate review the material and make a probable cause determination of obscenity. Cf. Gotlieb v. State, 406 A.2d 270, 273-75 (Del. 1979) (continuing business).

The hearing to obtain a warrant need only be ex parte, not adversarial. In Heller v. New York, 413 U.S. 483, 488 (1973) the Supreme Court stated that it had never held or implied the need for an adversarial hearing prior to initially seizing samples of allegedly obscene materials. It did not perceive that an adversary hearing would protect first amendment rights significantly better than an ex parte proceeding. Id. at 493. See also Roaden v. Kentucky, supra, 413 U.S. at 505 n.5; Lo-Ji Sales, Inc. v. New York, supra, 442 U.S. at 327-28 (distinguishing final restraint effected by large-scale seizure); Milky Way Productions, Inc., v. Leary, 305 F.Supp. 288, 296-97 (S.D.

Standford Daily, supra, 436 U.S. at 565; Flack v. Municipal Court for Anaheim-Fullerton, J.D., 429 P.2d 192 (Cal. 1967); State of New Jersey v. Parisi, 183 A.2d 801 (N.J. 1962). See generally Annot., 5 A.L.R.3d 1214 §4 (1966).

The same reasoning applies to seizure of persons allegedly distributing such materials.

A warrantless arrest is another type of seizure constitutionally required to be reasonable; Payton v. New York, 445 U.S. 573, 585 (1980). "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause. . . ." Beck v. Ohio, 379 U.S. 89, 96 (1964). Such safeguards are especially important in a case such as this, due to the aforementioned threat the police action poses to constitutionally protected speech.

In Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) the state claimed that police officers

N.Y. 1969) (Frankel, J.), aff'd. 397 U.S. 98 (1970). For the same reason, an adversarial hearing is not a necessary precondition to issuance of a warrant to arrest the alleged purveyors of obscene material. United States v.Green, 284 A.2d 879, 882 (D.C. App. 1971); Adler v. Pomerleau, 313 F. Supp. 277, 286 (D.Md. 1970) (3-judge court). An ex parte hearing will suffice.

could arrest suspects for crimes committed in the officers' presence, including distribution of obscene matter. The Fifth Circuit Court of Appeals responded:

> "The problem with appellant's claim is that the ability to make a warrantless arrest for an offense committed in the officer's presence contemplated the officer's ability to determine that an offense had actually been committed. Appellant is attempting to apply a statute normally appropriate for the case of a fleeing robber to items presumptively protected by the First Amendment. Appellant is incorrect in his belief that he or his agents may properly make the initial determination concerning the obscenity of a publication and that he may make a warrantless arrest if he determines that the subject matter of a publication is obscene." Id. at 1359.

Consequently, a necessary predicate to seizure of the person, as well as the allegedly obscene matter he distributes, is a prior judicial determination that there is probable cause to believe the matter is obscene. See also Hall v. State, 229 S.E.2d 12 (Ga. 1976); Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662, 667 (E.D. La. 1969). But see Price v. State, 579 S.W.2d 492, 495 (Tex.Crim.App. 1979); Carlock v. State, 609 S.W. 2d 787 (Tex.Crim.App. 1980).

A group of cases strikingly similar to appellant's were decided in State v. Furuyama, 637 P.2d 1095 (Haw. 1981). In some of those cases, plainclothes police officers purchased allegedly obscene magazines, then confiscated the purchase money and arrested the sellers. The Furyama court, citing the long line of Supreme Court decisions to which we have alluded, observed that:

> "the Supreme Court 'has been scrupulous in its insistence that the sensitive task of distinguishing legitimate from illegitimate speech be confided in a judicial office, rather than in the police. Lee Art Theatre v. Virginia, supra; Marcus v. Search Warrant, supra.'" Id. at 1100.

It held accordingly that:

> "a police officer may not effect a warrantless arrest in a setting where first amendment freedoms are implicated.
>
> * * *
>
> [J]ust as an officer's conclusory opinion that arguably protected material is pornographic does not give rise to probable cause supporting the issuance of a warrant authorizing its seizure . . . , such opinion cannot sustain the warrantless arrest of its putative promoter. See Roaden v. Kentucky, supra, 413 U.S. at 504-506, 93 S.Ct. at 2801-2802; Marcus v. Search Warrant, supra, 367 U.S. at 731-32, 81 S.Ct. at 1715-1716.
> . . .

> Thus the arrests of defendants cannot be upheld, for they were all premised on the ad hoc obscenity determinations of police officers; nor can we approve seizures of evidence incident thereto." Id. at 1100-1101.

B.

The State argues that appellant is not constitutionally entitled to the remedies of suppression or dismissal because the magazines were purchased, not seized, and an illegal arrest does not void subsequent conviction. These same contentions were raised in Furuyama. The court answered that such a holding would impermissibly circumvent first amendment protections:

> "Still, we are instructed by the Court that '[c]onstitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional righs of the citizen, and against any stealthy encroachments thereon."' Byars v. United States, 273 U.S. 28, 32, 47 S.Ct. 248, 249, 71 L.Ed. 520 (1927) (citations omitted). Therefore, we are obliged to scrutinize the circumstances surrounding the transactions in the foregoing light to decide whether the enforcement practices in question were covered by the constitutional provisions regulating searches and seizures.

Though the State insisted the magazines were bought, the circuit court found the 'purchases' actually were 'preconceived seizures.' A review of the record convinces us that every aspect of the missions in search of pornography and its purveyors was prearranged, including the repossession of the money given in 'payment' for the evidence. Yet, an element essential to the validity of the seizures, judicial concurrence regarding the obscene nature of the evidence, was missing. And the failure to seek a judge's opinion on the obscenity vel non of the publications could not have been inadvertent. Viewing the transactions in their entirety, we also believe they were 'preconceived seizures,' designed in part to evade that phase of the warrant procedure whose specific purpose is the protection of first amendment freedoms.

What is particulary objectionable here is that the alleged purchase in every instance, as part of a single planned transaction, was immediately followed by a warrantless arrest and the seizure of the money given in exchange for the allegedly obscene matter. Such a transaction, in our opinion, could not have been a purchase; there was no intent to part with the money as in an ordinary sale. And the appropriation of the allegedly obscene material and tangible evidence of the transaction was tantamount to a warrantless seizure. While somewhat similar practices have been ratified in different contexts, see, e.g., Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed. 2d 312 (1966), first amendment considerations militate against the approval of transactions expressly

designed to evade specific warrant requirements governing the seizure of material arguably subject to constitutional protection.

* * *

We are unable to sanction the seizures of evidence here, for we would then be party to the nullification of a Court-decreed 'sensitive tool' to separate 'legitimate from illegitimate speech.' Speiser v. Randall, supra, 357 U.S. at 525, 78 S.Ct. at 1341-1342. An aspect of the warrant procedure tailored to protect first amendment freedoms could not have been meant for easy evasion with a modicum of ingenuity." Id at 1101-02.

But see Hildahl v. State, 536 P.2d 1298, 1301 (Okla. 1975); State v. Richardson, 506 S.W. 2d 488, 489 (Mo. 1974).

We agree that the protection afforded by the first amendment may not be circumvented by such artifice. Free expression is, by its nature, vulnerable to grossly damaging yet barely visible encroachments, and must be girded about by the most rigorous procedural safeguards. Bantam Books, Inc. v. Sullivan, supra, 372 U.S. at 66. To permit the police, as a rule, to follow the practice used in this case would elevate form over substance, effectively santioning an "end run" around those safeguards. Id. at 67; Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1360 (5th Cir.

1980). We hold, accordingly, that the officers constructively seized the magazines in contravention of the constitutionally mandated warrant procedure.

The proper remedy for such a warrantless seizure is to exclude from trial the evidence so acquired; this has the virtue of deterring such misconduct and ameliorating its chilling effect on free expression. State v. Furuyama, supra, 637 P.2d at 1104-05.

The Furuyama court did acknowledge, however, that warrantless arrests do not bar prosecution.

The general rule, followed almost unanimously in state and federal courts, is that illegal arrest does not void a subsequent conviction. United States v. Crews, 445 U.S. 463, 474 (1980); Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Matthews v. State, 237 Md. 384, 387-88 (1965); Holiday News v. State, 53 Md. App. 344, 348-49 (1982); Hunt v. State, 601 P.2d 464, 466-67 (1979). See generally W.LaFave, Search and Seizure, §1.7(b) at 152-53 (1978); 5 Am.Jur.2d, Arrest §116 (1962); 22 C.J.S. Criminal Law, §144 (1961). But see United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

Appellant is not, however, left without a remedy for his unconstitutional arrest, as it furnishes an additional basis for exclusion of the magazines. The first amendment proscribes suppression of free expression even when publications are not seized in violation of the Fourth Amendment. In Bantam Books, Inc. v. Sullivan, supra, a government commission suppressed certain materials by informing distributors that it would recommend prosecution. The Court ruled that this intimidating practice was a system of informal censorship, violative of the first and fourteenth amendments. In Penthouse, Ltd., v. McAuliffe, supra, police investigators, in a concerted effort to discourage distribution of allegedly obscene materials, followed a procedure of purchasing magazines and examining their contents. If they thought a magazine was obscene, they would ask the retailer if he was aware of its contents. If he said yes, he was arrested without a warrant; if he said no, the officers would return the next day and arrest him without a warrant if the magazine was still being displayed. The publishers sought to enjoin this practice as violative of the first and fourteenth amendments. The government claimed that it did not "seize"

anything, since retailers and wholesalers, confronted with a campaign of warrantless arrests, "voluntarily" withdrew the publications from their shelves. The Fifth Circuit rejected this lame characterization:

> "[The State] was attempting to control items that are presumptively protected material because of the language of the First Amendment. . . . Therefore, a retailer or distributor of presumptively protected material must be afforded greater procedural safeguards before a seizure or 'constructive seizure' may take place. Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).

* * *

> It cannot be said that the retailers of the magazine in question 'voluntarily' removed the magazines from their shelves. As in Bantam Books, the procedure adopted . . . was a 'constructive seizure' and constituted a prior restraint." 610 F.2d at 1359, 1360.

The arrest in this case, moreover, forced appellant, who was the only employee in the store at that time, to usher out customers and close the store. Cf. State v. Huddleston, 412 A.2d 1148, 1158 (Del.Super. 1980) (arrest of only employee closed adult bookstore). For this reason, the arrest was more severely suppressive than the seizure of the two magazines, for it foreclosed public access as effectively as seizing all of the store's publications. The arrest thus

> "brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. . . . Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards."

Roaden v. Kentucky, supra, 413 U.S. at 504; quoted in State v. Denten Corp., 288 Md. 178, 189-90 ("More fundamentally, the freedom from prior restraint rests not only on a personal right to express ideas, but also on the right of the public to have access to information and ideas.").

The courts must be especially vigilant in applying procedural safeguards to discourage government officials from stifling the exercise of first amendment rights. To permit the warrantless arrest in this case to go unremedied would merely license a continuation of this practice, circumventing the safeguards and denying the rights. To prevent such circumvention, we therefore hold that where, as here, law enforcement officers arrest a suspected distributor of obscene matter without a warrant authorizing seizure of either the distributor or the matter, the proper remedy is to

exclude evidence of the allegedly obscene matter acquired in connection with that arrest. [2]

Since the matter taken from the Silver News bookstore should have been excluded from appellant's trial and since without that material there would be insufficient evidence to convict, we reverse this conviction and direct that the charges be dismissed. Burks v. United States, 437 U.S. 1 (1978).

JUDGMENT REVERSED

COSTS TO BE PAID BY

PRINCE GEORGE'S COUNTY.

2 The holding in this case is limited to First Amendment rights and is not to be construed as a modification of traditional Fourth Amendment rulings.